91-1288

Supreme Court, U.S.
OCT 10 1991
OFFICE OF THE CLERK

No. 91

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARION KINDIG, BLAND LANE, TOM VALENTINE,
Future and Present Pan Am Pensioners,
Taxpayers and Consumers,
Petitioners

vs.

DEPARTMENT OF TRANSPORTATION,
Respondent

UNITED AIR LINES, INC., et al..
Intervenors

PETITION FOR A WRIT OF CERTORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ISSUES PRESENTED

This case concerns the Department of Transportation approval of the Pan Am sale of its London-Heathrow Routes to United Airlines -- the lowest bidder (without allowing the routes to go to an open bidding procedure). Petitioners, long-time employees of Pan Am, consumers and taxpayers, intervened in the Department of Transportation proceedings protesting the sale because other airlines (American Airlines, Delta Airlines, Trans World Airlines, Northwest Airlines and investor Kirk Kerkorian) offered considerably more for the Pan Am London-Heathrow Routes than United Airlines.

The Department of Transportation totally ignored this evidence despite three (3) briefs filed by petitioners advising them of the aforementioned. Despite this and similar evidence filed by the major airlines and others, the Department of Transportation

approved the sale and thereby put into jeopardy petitioners' pension rights under the collective bargaining agreement, as taxpayers who will foot the ensuing bailout and as consumers who will be faced with higher fares. Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit, which on the motion of the Department of Transportation dismissed the suit for want of standing.

1. Do long-time employees whose pension rights are put at risk (the future pension cash payments are in jeopardy, and the medical, dental, vision, hospitalization and prescription payments rights under the collective bargaining agreement were cancelled by Pan Am on November 27, 1991, due to lack of funds in the estate), taxpayers who will be asked to pay for the ensuing bailout and consumers who will be faced with higher fares, have standing to protest the Department of Transportation's ruling?

2. Did the Department of Transportation violate its statutory mandate under 49 U.S.C., §401(h)(1) that it refuse approval of a route unless transferring that route is in the public interest when it permitted the sale of the London-Heathrow Routes to the lowest bidder (United Airlines), despite higher bids from reputable airlines such as American Airlines, Delta Airlines, Trans World Airlines, Northwest Airlines and investor Kirk Kerkorian?

3. Was the Department of Transportation correct in its reliance on false testimony by seller Pan Am and its purchaser United Airlines, which petitioners and others asserted was false and perjurus -- without providing an opportunity for an oral-evidentiary hearing?

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Petitioners Marion Kindig, Bland Lane and Thomas Valentine, et al., respectfully pray that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on May 31, 1991 and September 16, 1991.

OPINIONS BELOW

The opinions and orders rendered by the Court of Appeals for the District of Columbia Circuit are reprinted in the appendix attached hereto.

On May 31, 1991, the United States Court of Appeals for the District of Columbia Circuit ordered that the Department of Transportation's motions to dismiss be granted, and that petitioners' suggestion of two more violations under Rule 11 as a result of intervenors' perjurus testimony and intervening without at that point having been given permission by the Court, be denied.

On September 16, 1991, the United States Court of Appeals for the District of Columbia Circuit ordered that petitioners' Petition for a Rehearing En Banc, filed July 15, 1991, be denied.

JURISDICTION

Petitioners brought this suit in the United States Court of Appeals for the District of Columbia Circuit. Jurisdiction is invoked under Article III, §1 of the Constitution and 28 U.S.C., §1337; under Article III, §2, of the Constitution; Amendment XIV of the Constitution; 49 U.S.C. §401(h)(1), §401(h)(2) and §401(h)(3); and under Rules of the Supreme Court, Rule 10(a) and (c).

STATEMENT OF THE CASE

Pan American World Airways, Inc. and its parent, Pan Am Corporation, Inc. (hereinafter referred to as Pan Am) plundered its employee pension plans in the amount of $914 million, according to figures released by the Pension Benefit Guarantee Corporation (hereinafter referred to as PBCG).

Pan Am then sold its valuable London-Heathrow Routes to United Airlines, Inc., (hereinafter referred to as United) for the firesale price of $290 million without allow-

ing the routes to go to an open bidding procedure and while refusing to discuss the London-Heathrow Route sale with several other higher bidders.

REQUIREMENTS THE DEPARTMENT OF TRANSPORTATION MUST COMPLY WITH BEFORE TRANSFERRING A ROUTE

The Department of Transportation (hereinafter referred to as the DOT) approved the sale of the valuable London-Heathrow Routes from Pan Am to United despite violations of the appropriate statutory requirements.

> 49 U.S.C., §401(h)(1) states that in order to transfer a route, the route transfer must be in the public interest. Obtaining the maximum amount for the London routes in an open bidding procedure could defray the $914 million shortfall in the Pan Am pension plans -- thereby helping to provide to the 40,000 Pan Am beneficiaries what they had been promised by contract all of their working lives, and causing the public and the taxpayer not to be saddled with the ensuing bailout.
>
> 49 U.S.C., §401 (h)(2) requires that an airline be viable after the route transfer. As evidenced by Pan Am's closing its doors last week, receiving the lowest bid for its London routes accelerated Pan Am's demise.
>
> 49 U.S.C., §401(h)(3)requires that a route transfer be competitive. Giving

United a monopoly of routes is anti-competitive and will result in higher fares for the consumer.

The DOT approved the $290 million sale of the London-Heathrow Routes to United in spite of conclusive evidence that this was a firesale. Evidence was presented to the DOT that American Airlines, Inc., (hereinafter referred to as American) was willing to better by far United's offer, and the CEO of American had publicly stated that Pan Am's Heathrow-London Routes were worth at least $500 million. There were 5 (five)higher bidders, and Pan Am refused to discuss the London-Heathrow Route sale with American or any of the other bidders. In a brief filed with the DOT on March 29, 1991, American states:

"It is past time for United to stop pretending that it is dealing on an arms-length basis with Pan Am, and acknowledge that it has crossed the line into a control relationship"

Delta Airlines, Inc., (hereinafter referred to as Delta) attempted as well to bid for the Pan Am London routes, and filed an Objection with the DOT relating to the proposed sale of those routes to United.

Trans World Airlines, Inc., (hereinafter referred to as TWA), Northwest Airlines, Inc, (hereinafter referred to as Northwest), and financier Kirk Kerkorian attempted to bid for Pan Am's London-Heathrow Routes -- but to no avail.

The DOT's approval of Pan Am's London-Heathrow Route transfer to United is extremely detrimental to the public interest. Not only are the cash payments to the Pan Am beneficiaries in dire risk (some Pan Am beneficiaries have already lost a portion of their cash payments), but all of the beneficiaries -- including petitioners Kindig and Lane -- have been directly injured by Pan Am's announcement of last week that it was cancelling all of the beneficiaries' medical, dental, hospitalization, vision and pres-

cription and other insurance plans to which the Pan Am beneficiaries are entitled by contract, as a result of there being no funds in the estate to pay for these promised benefits. When this was announced at the somber Pan Am Bankruptcy hearings of last week, one despondent, elderly beneficiary stated:

> "My husband is in a nursing home under special care, and the payments are very high. Pan Am promised me these benefits as part of my compensation. I have no money, and I cannot make the payments. What am I supposed to do, kill my husband?"

This injury, suffered by petitioners and other Pan Am beneficiaries, is directly traceable to Pan Am's receiving insufficient monies from the firesale of its London-Heathrow Routes to United, and can be effectively redressed by having these routes go to an open bidding procedure as a result of a favorable decision by this Court. According to other recent, similar route sales, these routes could be sold for several hundred million dollars more.

The aforementioned is not where the injury to petitioners ends. In a pension hearing before Congressman Tom Lantos on October 31, 1991, the GAO testified that:

> "It is difficult to accurately estimate the PBGC's future liability. A plan's liability to terminate is often greater than reported to the Internal Revenue Service in annual filings"

It was brought out in the testimony that there are various ways in which actuarial tables can be done, and when a corporation has a seriously underfunded pension, it will generally underestimate the seriousness of the situation. Until a plan is terminated the PBGC has no figures to go by other than those released by the corporation. Consequently, the PBGC has no accurate assessment of what its' actual potential liability is. For example, Pan Am had estimated the underfunding of its pension plans at approximately $500 million. When the PBGC terminated the plans, it found the underfunding to be $914 million.

The GAO further testified:

> "The PBGC should be able to pay its benefit obligations in the short run without assistance from the federal government...One group or another will have to bear the costs...Several options are available to lessen the size or impact of future claims against the PBGC...reduce the level of benefit protection currently afforded plan participants...A reduction in protection will lower lifetime benefits paid to some or all PBGC payees"

In a speech before the American Society of Pension Actuaries on October 2, 1991, Mr. James Lockhart, Executive Director of the PBGC stated:

> "PBGC also had an anniversary recently -- last month. It was our 17th. Based on the type of year we have had, I sometimes wonder if we will make it to our 25th anniversary...Unless we find ways to stop the growth of our deficit, the specter of ever increasing premiums and ultimately an S&L-type bailout looms in our future"

In a Memorandum filed before the United States Supreme Court in the LTV case, Mr. Lockhart stated that ultimately the total cost of the taxpayer bailout of the nation's pension funds could run into the hundreds of billions of dollars.

Mr. Raymond Maria, the former Inspector General of the Department of Labor (hereinafter referred to as the DOL), has testified before numerous Congressional Committees that when the fraud and abuse in the nation's pension funds is finally brought to light, it will dwarf the Savings & Loan scandal.

As can been seen from the aforementioned, not only have petitioners already sustained an actual loss from the cancellation of their benefit package and insurance, but there is a dire threatened injury to the cash payments to be received from the PBGC -- either by a partial reduction or a total loss of those cash payments. Petitioners are additionally seriously threatened by an injury from the ensuing taxpayer bailout. This is directly traceable to hundreds of millions of dollars not being in the estate as a result of the firesale to United and can be directly redressed (at least in great part) by a favorable decision by this Court.

As what has been cited in this pleading poignantly shows, the standards which apply to a threatened injury have more than been met as regards cash pension payments. In addition to that, the real injury has already been suffered by the actual loss of all of the petitioners' other benefits.

THE DOT MADE RULINGS CONTRARY TO THE PUBLIC INTEREST

The DOT made rulings in the instant case which are not only extremely detrimental to the public interest, but are also in violation of the applicable statutory requirements under 49 U.S.C., §401(h), et seq. that a route may not be transferred unless it is in the public interest.

> **It is not in the public interest to defraud 37,000 beneficiaries out of benefits they have earned as deferred compensation all of their working lives and to which they are entitled by contract.**
>
> **It is not in the public interest to have some of these beneficiaries become wards of the state.**
>
> **It is not in the public interest to have the public and the taxpayer burdened unnecessarily with yet another S&L-type bailout.**

PERJURUS STATEMENTS BY PAN AM AND UNITED

From the outset of these proceedings, Pan Am and United have consistently made false statements to the Bankruptcy Court, to the DOT and to the United States Court

of Appeals for the District of Columbia Circuit. In addition, Pan Am and United created 6 (six) sham emergencies in order to ramrod this transaction. They have perjured themselves in affidavits falsely stating that there were no other bidders, and that no one else was interested in the routes. At each of the 6 (six) feigned emergencies, they claimed that"Pan Am would cease to operate" if the transaction were not approved immediately--neglecting to tell the courts and the DOT that there were lending institutions willing to lend DIP financing. Petitioners did submit briefs with corroborating evidence showing that Pan Am and United were making false statements. The DOT-relied upon this perjurus testimony to make its decision and ignored the evidence submitted by petitioners.

The DOT harm was compounded when the Court of Appeals countenanced the perjury

and ignored evidence showing that American had an interest in London routes -- as well as a letter from Delta which was submitted, together with Delta's Objection before the Bankruptcy Court and Delta's Objection before the DOT relating to the London Route transfer to United. Delta's letter in part states:

> "Reference to Delta's interest in the Los Angeles-London route are set out in Paragraph 10 of the Bankruptcy Court filing and in Section IV on page 13 of the DOT filing. Delta remains interested in the Los Angeles-London route and in other London route authority as described in these and other public documents."

The record is tainted by perjured testimony from Pan Am and United.

THE ISSUE OF STANDING

The Appeals Court refused to hear this case by denying standing, citing the very cases which would reinforce petitioners' standing in the instant case. Petitioners have suffered an actual injury by the loss of their medical, dental, hospitalization, vision, prescription and other insurance

benefits. In addition, there is a great risk of further injury by the partial loss or total loss of petitioners' cash payments, as described in detail heretofor. Besides that, petitioner Kindig has a claim for back salaries and benefits, which have not as yet been reimbursed. All of these actual and threatened injuries are directly traceable to the lack of funds obtained by the estate as a result of the firesale giveaway to United, and a favorable decision by this Court will redress the matter.

> "The constitutional requisites under Article III for the existence of standing are that the party seeking to sue must personally have suffered some actual or threatened injury that can fairly be traced to the challenged action of defendant and that the injury is likely to be redressed by a favorable decision." Valley Forge Christian College v. Americans United, 454 U.S. 464, 472 (1982).

In United Transportation Union v. ICC, 891 F.2d 908, 913 (D. C. Cir 1989), which the Appellate Court cites, on page 911 it states:

"the injury alleged must be ... distinct and palpable ... and not abstract or conjectural or hypothetical." Allen v. Wright, 468 U.S. 737, 751 104 S.Ct 3315, 3324, 82 L.Ed.2d 556 (1984).

In the Competitive Enterprise Institute v. NHTSA, 901 F.2d 107, 112 (D.C. Cir 1990) case which the Appellate Court cites, it states:

"Harm that will satisfy 'injury in fact' requirement that must be fulfilled to have standing to challenge agency action can be actual or threatened, but must be distinct and palpable; mere harm to ideological interest will not suffice." U.S.C.A.Const. Art 3, § 1 et seq.

"For purposes of casualty requirement of constitutional standing, it is not necessary to prove cause-and-effect relationship between agency action and alleged injury with absolute certainty; substantial likelihood of alleged casualty meets test, even where injury hinges on reactions of third parties to agency's conduct. U.S.C.A.Const. Art. 3, § 1 et seq.

"In general, plaintiff has standing to challenge administrative action in federal court only if challenged action caused injury-in-fact and if alleged injury was to interest arguably within

> zone of interests to be protected or regulated by statutes that agencies were claimed to have violated; however, where Congress intends standing to reach to full limits of Article III, courts lack authority to impose prudential barriers to standing." U.S.C.A. Const. Art. 3, § 1 et seq.

Clearly, the petitioners do have standing, and more than meet the required standards. If petitioners do not have standing to protest the looting of their funds -- who does have standing? Petitioners Kindig and Lane are long-time employees of Pan Am, and part of their compensation was a current salary, and part of their compensation was a deferred benefit to be paid later as cash pension payments and a pension benefits package. This is their money!

REASONS FOR GRANTING THE WRIT

The significance of this case is that 37,000 beneficiaries have contributed their life's work with the promise that in their golden years they would receive specified

cash pension payments, and as outlined in the aforementioned, various medical, insurance and other benefits. Instead of providing the needed resources to make good on its contractual agreements, Pan Am instead plundered its employee pension plans by $914 million and sold its London-Heathrow Routes to United at firesale, giveaway prices.

1. Petitioners easily meet the standards and requirements for standing in this case. In view of the potential injuries with which they are faced -- plus the actual injuries which they have already sustained -- denying standing would mean that every working American would have his and her future savings at risk.

2. If beneficiaries who have been looted do not have standing to protest, who does have standing?

3. The DOT misconstrued the meaning and scope of §401(h)(1) by approving

a route transfer which is not only contrary to the public interest, but could lead to another taxpayer bailout. The DOT did not consider the general impact upon the public, and this Court can ameliorate the loss to the 37,000 Pan Am beneficiaries and can save the taxpayer from another S&L-type bailout. The DOT violated the very statutes it is mandated to uphold.

4. The DOT and the Appellate Court relied upon testimony which is tainted by perjury.

WHY WOULD THE DOT APPROVE A ROUTE TRANSFER WHICH DOES NOT COMPLY WITH ANY OF THE STANDARDS WHICH IT IS MANDATED TO MEET UNDER 49 U.S.C., §401(h)(1), ET SEQ.?

The answer to that most poignant question may possibly lie in Secretary Skinner's past record.

Nutrasweet and its' parent, G. D. Searle, had filed false statements and scientific reports with the Food and Drug Administration (hereinafter referred to as the "FDA") regarding its' tests on Nutrasweet. Based upon these false statements and re-

ports, approval was granted. When the falsity of the aforementioned statements and reports came to light, the FDA notified Mr. Skinner (then U. S. Attorney for the Northern District of Illinois) that there would be am impending Grand Jury request. This was followed up by a formal 33-page letter from the FDA written to Mr. Skinner on January 10, 1977, recommending a Grand Jury investigation of the foregoing violations, including the False Reports to the Government Act, 18 U.S.C., §1001, amongst others, "for concealing material facts and making false statements in reports of animal studies". Mr. Skinner was requested to expedite the case as the statute of limitations was running out.

Mr. Skinner stalled. On January 26, 1977, Searle's law firm of Sidley and Austin wrote to Mr. Skinner requesting a meeting "prior to submission to a grand jury of any matters relating to this company". On

February 2, 1977, lawyers for Sidley and Austin did, in fact, meet with Mr. Skinner. Shortly thereafter, Mr. Newton Minow of Sidley and Austin offered Mr. Skinner a position with his law firm.

On April 13, 1977, Mr. Charle Kocoras, First Assistant U. S. Attorney, wrote a memo to Mr. Skinner stating, "It is my opinion that a Grand Jury investigation be undertaken at the earliest time". He further stated that any delay would be "inappropriate".

On July 1, 1977, Samuel Skinner joined Sidley and Austin. The case was ultimately too late to bring before the Grand Jury.

AND, in keeping with family tradition, Mrs. Skinner is currently employed at the Washington office of Sidley and Austin.

In the instant case it is very perplexing why the DOT would have approved a route transfer which does not meet any of the standards which must be met under 49 U.S.C., §40.(h)(1), et seq.; which is not in the

public interest; which is devasting to 37,000 Pan Am beneficiaries; which will very likely turn into a nightmare for the hapless taxpayer; and which saved United several hundred million dollars.

Petitioners certainly hope that this does not turn out to be another Nutrasweet case.

CONCLUSION

For all of the above reasons, petitioners pray that the Honorable Justices of the Supreme Court will grant this Petition for a Writ of Certiorari.

Not only will the Honorable Justices be doing justice to 37,000 beleagured Pan Am beneficiaries, but they will be saving the American public from the dismal fate of yet another taxpayer bailout.

Respectfully submitted,

MARION KINDIG

December 16, 1991

APPENDIX

Order filed May 31, 1991

Order Filed September 16, 1991

Order Filed September 16, 1991

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1114 September Term, 1990

Marion Kindig, Bland Lane

Thomas Valentine, et al.,

Future and Present Pan Am

Pensioners, Taxpayers and

Consumers -

Petitioners Filed May 31, 1991

v. Constance L. Dupre

Department of Transportation,

Respondent

United Air Lines, Inc, et al.,

Intervenors

BEFORE: Wald, Silberman and Williams,

Circuit Judges

ORDER

Upon consideration of the motions to dismiss, the responses thereto and the reply, and petitioners' suggestion of two more violations under rule 11, it is

ORDERED that the motions to dismiss be granted. Petitioner has failed to demonstrate that she has suffered actual or threatened injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision by this court. See Competitive Enterprise Institute v. NHTSA, 901 F.2d 107, 112 (D.C. Cir 1990; United Transportation Union v. ICC, 891 F.2d 908, 193 (D.C. Cir. 1989); American West Airlines, Inc. v. Burnley, 838 F.2d 1343, 1344 (D.C. Cir. 1988). It is

FURTHER ORDERED that petitioners' suggestion of two more violations under Rule 11 be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1114 September Term, 1990

Marion Kindig, Bland Lane, Thomas Valentine, et al., Future and Present Pan Am Pensioners, Taxpayers and Consumers.

Petitioner Filed Sep. 16, 1991

v. Constance L. Dupre

Department of Transportation

Respondent

BEFORE: Mikva, Chief Judge, Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

Petitioners' Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of

the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curium

FOR THE COURT

CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1114 September Term, 1991

Marion Kindig, Bland Lane, Thomas Valentine, et al., Future and Present Pan Am Pensioners and Consumers Filed Sept. 16, 1991

Petitioner Constance L. Dupre

v. Clerk

Department of Transportation,

Respondent

BEFORE: Wald, Silberman and Williams, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing, filed July 15, 1991, it is

ORDERED, by the Court that the petition is denied.

Per Curiam

FOR THE COURT

CONSTANCE L, DUPRE, CLERK

BY: s/ Robert H. Bonner

Robert A. Bonner

Deputy Clerk